May 11, 2004

ORDER

SUBJECT: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba

1. INTRODUCTION AND BACKGROUND

This Order establishes an administrative review process to assess annually the need to continue to detain each enemy combatant during the course of the current and ongoing hostilities. This process will permit each enemy combatant in the control of the Department of Defense ("DoD") at the Guantanamo Bay Naval Base, Cuba ("GTMO") to explain why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or to explain why his release would otherwise be appropriate.*

The law of war permits the detention of enemy combatants until the end of an armed conflict. It permits that detention for the practical purpose of preventing the enemy from rejoining the conflict. It does not require the use of a review process to support continued detention. Nevertheless, to address some unique and unprecedented characteristics of the current conflict, DoD has determined, as a matter of policy, to implement these procedures. These procedures may be amended from time to time, also as a matter of policy, as circumstances in the conflict warrant.

A. *Existing Procedures.*

The procedures established by this Order offer a layer of review in addition to the other layers of review already in place for enemy combatants detained at GTMO. Under pre-existing guidance, captured individuals are assessed at the time of their capture by military officers in the field. Those officers determine whether those captured individuals were part of or supporting forces hostile to the United States or coalition partners, or otherwise engaged in an armed conflict against the United States. If the individuals detained meet those criteria, they are enemy combatants. If they do not, they are released.

Those persons determined to be enemy combatants are subsequently sent to a centralized holding facility where a military screening team reviews all available information regarding each detainee to again review whether the individual is an enemy combatant. With the assistance of other U.S. government officials (including military lawyers, intelligence officers, and federal law enforcement officials) and considering all relevant

* Similar administrative review procedures will be issued for enemy combatants in the control of DoD in the United States.

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information (including the facts from capture and detention, the threat the individual poses, his intelligence value, and any law enforcement interest) the military screening team assesses whether the detainee is an enemy combatant and should continue to be detained and whether transfer to GTMO is warranted.

After the screening team makes this assessment, a general officer designated by the combatant commander reviews the central holding area screening team's recommendation. When determining whether a detainee should be transferred to GTMO, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained from the detainee, possible law of war violations committed by the detainee, and any other relevant factors. DoD officials in Washington review those proposed for transfer to GTMO prior to their transfer. An internal DoD review panel, including legal advisors, reviews the recommendations of the combatant commander and advises the Secretary of Defense on proposed detainee transfers to GTMO. All available information is considered in those reviews, including information submitted by other governments or obtained from the detainees themselves. In the event that enemy combatants are transferred to GTMO, immediately upon their arrival at GTMO, they are interviewed and further assessments are made based on relevant information, including detainee interviews, U.S. intelligence and law enforcement sources, and information supplied by foreign governments.

Each enemy combatant detained at GTMO also undergoes an extensive assessment of the threat he poses. This threat assessment process is used to determine whether, notwithstanding his status as an enemy combatant, he can be transferred to the custody of another government, can be released, or should remain detained in the control of DoD. Threat assessments of each detainee are made by an integrated team of interrogators, analysts, behavioral scientists, and regional experts. Those threat assessments are provided to the Commander, U.S. Southern Command for review and recommendation. The Southern Command then forwards its recommendations to an interagency committee in Washington that includes law enforcement, intelligence, and defense representatives. That interagency committee makes an assessment and recommendation. The Secretary of Defense or his designee then decides whether transfer of the detainee to the custody of another government, release of that individual, or his continued detention in DoD control is appropriate.

B. *Relationship of this Order to Existing Procedures.*

Once an enemy combatant has been reviewed by the interagency process described above and the Secretary of Defense or his designee has determined that his continued detention in the control of DoD is appropriate, he will be eligible for review of the need for his continued detention under the procedures this Order establishes. This Order provides the authority to empanel as many review board panels as are deemed necessary to accomplish the review of the enemy combatants in the control of DoD at GTMO.

2. ESTABLISHMENT OF ADMINISTRATIVE REVIEW PROCESS

A. *Administrative Review Process.* There is established the Administrative Review Board ("Review Board"). The Review Board will assess whether each enemy combatant remains a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or if there is any other reason that it is in the interest of the United States and its allies for the enemy combatant to remain in the control of DoD. Based on that assessment, the Review Board will recommend whether the enemy combatant should continue to be detained in the control of DoD.

B. *Administrative Review Board*. The Review Board shall be composed of three or more military officers.

- i. *Establishment of Review Board.*
  - a. The Review Board shall report to and be selected by a presidentially-appointed Senate-confirmed civilian in the Department of Defense whom the Secretary of Defense has designated to operate and oversee the administrative review process ("designated civilian official" or "DCO").
  - b. The Review Board may sit in panels of three members each.
  - c. The DCO may establish as many review board panels as he deems necessary.
- ii. *Qualifications of Review Board Members.*
  - a. Military officers assigned to serve as Review Board members shall be those who are, in the DCO's view, qualified for the duty by reason of education, training, experience, length of service, temperament, and objectivity.
  - b. At least one member of a Review Board panel shall be experienced in the field of intelligence.

C. *Presiding Officer*. For the purpose of its deliberations and any hearing held pursuant to this Order, the senior member of the Review Board, or any Review Board panel, shall be the presiding officer. The sole role of the presiding officer as presiding officer shall be to ensure the orderliness of board proceedings. The presiding officer's vote in board determinations will be accorded the same weight as the votes of the other members of the Review Board.

D. *Legal Counsel*. The General Counsel of DoD shall ensure that the Review Board has the assistance of legal counsel.

E. *Enemy Combatants Eligible for the Procedures in this Order*. Enemy combatants who are in the control of DoD at GTMO are eligible for the review procedures established in this Order.

i. Enemy combatants whom the President has determined to be subject to his Military Order of November 13, 2001 are excepted from the procedures established in this Order until the disposition of any charges against them or the service of any sentence imposed by a military commission.

ii. An enemy combatant in the control of DoD at GTMO will become eligible for the review process once he has been reviewed through the previously established procedures described in Section 1 and the Secretary or his designee has determined that his continued detention is appropriate.

iii. An enemy combatant may decline in writing to participate in the procedures established by this Order. If the enemy combatant is unable to provide a written declination, the assisting military officer provided under Section 3.B shall prepare and execute such a writing on the enemy combatant's behalf.

3. ADMINISTRATIVE REVIEW BOARD PROCEEDINGS

A. *Review Board Proceedings*. The proceedings before the Review Board shall be non-adversarial.

i. *Provision of Information by the Government of the State of Which the Enemy Combatant is a National*.

a. Unless the DCO determines that it is not consistent with national security, the DCO shall request that the Department of State notify the State of which the enemy combatant is a national ("the State") of the proceedings.

1) The notice shall be provided in advance of the proceedings to permit the State to prepare and present information to the Review Board.

2) The notice to the State shall provide that information submitted by the State shall be in writing, except as otherwise deemed appropriate by the Review Board, and that it shall be provided on or before a date specified by the Review Board.

3) Unless the DCO concludes that it is not consistent with national security, the notice shall also include a request for the State to notify the enemy combatant's relatives of the proceedings and inform them that they may provide information relevant to the proceedings through the State's written submissions.

b. Unless the DCO determines that it is not consistent with national security, the State may submit to the Review Board information of any nature, including information related to the threat posed by the enemy combatant to the

United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters.

c. In the event that the submission of a State is not received by the date established by the Review Board, the Review Board may disregard the State's submission.

ii. *Provision of Information by a Designated Military Officer*.

a. A designated military officer ("Designated Military Officer") shall provide to the Review Board all reasonably available threat information in the possession of DoD regarding the enemy combatant under review and any other information indicating whether it would be in the interest of the United States and its allies to release, transfer, or continue to detain the enemy combatant. That information shall include any information that tends to support continued detention as well as any information that tends to support release or transfer.

b. The Designated Military Officer is not an advocate for or against the continued detention of the enemy combatant under review.

c. The Designated Military Officer who shall be selected by the DCO must meet the same qualifications set forth for members of the Review Board under Section 2.B.ii.a.

d. In addition to any other information or documentation presented to the Review Board, the Designated Military Officer shall prepare, in unclassified form, a written summary of the primary factors favoring continued detention of the enemy combatant and the primary factors favoring release or transfer. When the Review Board deems it appropriate, the Designated Military Officer may present information orally.

iii. *Presentation of Information by the Enemy Combatant.*

a. Notice. Prior to the enemy combatant's hearing, the Review Board shall provide notice to the enemy combatant of the hearing and shall make available to the enemy combatant the written summary prepared by the Designated Military Officer.

1) The summary provided to the enemy combatant shall be in a language he understands.

2) The summary provided to the enemy combatant shall be provided sufficiently in advance of the hearing so as to permit him to prepare his presentation to the Review Board.

3) In no circumstances shall classified information be made available to the enemy combatant.

b. Opportunity to be Heard. The enemy combatant shall be permitted to present to the Review Board information on why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters, why it is otherwise appropriate that he be released, or any other relevant information.

1) The enemy combatant will be permitted to present this information in person at a hearing before the Review Board.
2) Members of the Review Board may question the enemy combatant during the hearing.
3) If necessary, an interpreter shall be supplied for the combatant's presentation of information to the Review Board.

B. *Assistance to the Enemy Combatant.* The Review Board shall assign a military officer ("Assisting Military Officer") to assist the enemy combatant in preparing his presentation to the Review Board.

i. The Review Board shall select the Assisting Military Officer from a pool of military officers selected by the DCO to serve as Assisting Military Officers.
   a. The Assisting Military Officer shall meet the same qualifications established for members of the Review Board under Section 2.B.ii.a.
   b. The Assisting Military Officer and the Designated Military Officer may not be the same person in the review of an enemy combatant.

ii. The Assisting Military Officer shall be responsible for explaining to the enemy combatant the nature of his hearing before the Review Board.

iii. The Assisting Military Officer shall be permitted to see all information and documentation provided to the Review Board by the Designated Military Officer.

iv. The Assisting Military Officer shall be permitted to meet with the enemy combatant prior to the enemy combatant's presentation to the board. If necessary, an interpreter shall be supplied for those meetings.

v. If the enemy combatant so elects, the Assisting Military Officer may also present information to the Review Board on behalf of the enemy combatant. If the enemy combatant has made such an election and the Assisting Military Officer believes that it would aid the Review Board's deliberations, the Assisting Military Officer may also, outside the presence of the enemy combatant, comment upon classified information that has been submitted to the Board and that bears upon the enemy combatant's presentation.

C. *Information from Other Relevant U.S. Government Agencies.* The Review Board shall provide to the Department of State, the Department of Justice, the Department of Homeland Security, and the Central Intelligence Agency notice of the proceedings for the enemy combatant.

i. That notice shall be provided in advance of the proceedings for that enemy combatant so as to permit the agencies sufficient time to provide to the Review Board any information they deem relevant prior to the hearing.

ii. Any submissions that these agencies elect to provide shall be in written form except in extraordinary cases.

iii. In the event that the summary prepared by the Designated Military Officer and provided to the enemy combatant includes information that originated in U.S. government agencies other than DoD, the Review Board must obtain the originating agency's permission to share that information with the enemy combatant in any form.

D. *Additional Fact-Gathering.* If, after the initial presentation of information, the Review Board believes additional information is necessary before it can make a recommendation, the Review Board may seek additional facts. It may, among other things:

i. submit written questions to the Designated Military Officer or the Assisting Military Officer;

ii. request further behavioral assessments of the combatant;

iii. request further questioning of any other combatants who have had contact with the enemy combatant under review while in detention to the extent that the Combatant Commander determines that such questioning is consistent with ongoing intelligence collection; and

iv. seek other information that may be obtained readily.

E. *Review Board Recommendations.* The Review Board shall make a written assessment of whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters and any other factors bearing upon the need for continued detention. Based on that assessment, the Review Board shall provide to the DCO a written recommendation on whether detention should be continued.

i. The Review Board's assessment and recommendation shall be independent, based on the Review Board's review of all reasonably available information.

ii. The Review Board's assessment and recommendation shall be reached by a majority of the members of the Review Board panel. In the event that a recommendation is not unanimous, any dissenting board member may submit a minority report to the DCO. That report shall take the same form as the written assessment and recommendation to be submitted by the majority.

iii. The Review Board's written assessment and recommendation shall include:

a. the Review Board's conclusion regarding the threat posed by the enemy combatant;

b. supporting reasons for that conclusion regarding the threat, including, but not limited to, a summary of information relied upon in reaching that conclusion;

c. any other reasons that the continued detention of the enemy combatant remains or does not remain in the interest of the United States and its allies; and

d. the supporting reasons for the recommendation.

iv. The written assessment and recommendation shall be provided to the DCO along with the record of the proceedings. Notice of the assessment and recommendation shall also be provided to any U.S. government agency that submitted information to the Review Board.

v. The determination to continue to detain, release, or seek the transfer of the enemy combatant to the control of another government rests with the DCO. The DCO shall examine whether there is reason to believe that the enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters and any other factors bearing upon the need for continued detention. Based on that examination, the DCO shall determine whether to continue to detain, release, or seek the transfer of the enemy combatant to the control of another country. He shall give full consideration to the written assessment and recommendation of the Review Board.

vi. Notification of the DCO's determination will be provided to the Secretary of Defense, the enemy combatant, the Review Board, the relevant government agencies, and to the extent consistent with national security, the State of which the enemy combatant is a national.

F. *Frequency of Review*. The Review Board shall examine the need for the continued detention of each combatant at least annually insofar as is practicable.

4. ROLE OF THE DCO

A. The DCO shall oversee and operate the administrative review process established by this Order.

B. The DCO may establish as many review board panels as he deems necessary.

C. The DCO shall, as he deems necessary and appropriate, coordinate his actions and determinations with other U.S. government departments and agencies.

D. The DCO may seek the assistance of the General Counsel of DoD as appropriate.

E. The DCO shall have the authority to request support, including but not limited to military and civilian personnel, administrative assistance, and logistical assistance, from the head of any DoD component or office to oversee and operate the administrative review process and to accomplish the transfer or release of an enemy combatant. DoD component heads shall promptly provide such assistance. In addition, the DCO may seek the establishment of an executive agency or agencies under DoD Directive 5101.1 to assist him in implementing this Order.

F. The authority granted to the DCO in this Order may not be delegated except with the approval of the Secretary of Defense.

5. CLASSIFIED INFORMATION

Classified information shall be handled in accordance with all applicable laws and regulations. The DCO should issue implementing guidance to ensure the proper handling and protection of classified information.

6. OTHER

This Order is neither intended to nor does it create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. These procedures involve military authority exercised in the field in time of war. No provision in this Order shall be construed to be a requirement of the United States Constitution or a requirement of any other body of law nor shall this Order be construed to alter the requirements that the law of war imposes. The procedures established by this Order, along with the other procedures described above, have been implemented as a matter of discretion. Because the procedures described in this Order have been instituted as a matter of discretion, the Secretary of Defense may suspend or amend the procedures set forth in this Order at any time.

7. IMPLEMENTING GUIDANCE

The DCO may, as he deems appropriate, issue guidance to implement this Order.

8. EFFECTIVE DATE

This Order is effective immediately.

Paul Wolfowitz
Deputy Secretary of Defense